

No. 83-504

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1983

FIELD CONTAINER CORPORATION,

v.

Petitioner,

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT
CHICAGO AND NORTH WESTERN TRANSPORTATION
COMPANY

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Dated: October, 1983

QUESTION PRESENTED

Did the Court of Appeals err as a matter of law in affirming the findings of the Interstate Commerce Commission (Commission) that respondent Chicago and North Western Transportation Company (North Western) was justified in constructively placing and holding loaded freight cars until receipt of instructions for placement of the cars at the plant of petitioner Field Container Corporation (Field), and that due to the existence of an "average demurrage agreement" between the parties Field was not excused from the payment of demurrage charges due to adverse weather conditions that prevented it from timely unloading cars at its plant?

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STATEMENT

This case involves a petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Seventh Circuit (App. 1a-11a)¹ affirming a decision of the Commission denying relief requested by petitioner Field in a formal complaint challenging the applicability and reasonableness of certain demurrage charges assessed by respondent North Western during the months of January, February and March of 1979, and ordering Field to pay demurrage charges amounting to \$18,870.00 to North Western (App. 12a-15a).

1. Appendix references in this brief (e.g., "App. 1a") are to the appendix attached to the petition for writ of certiorari.

The basis for Field's complaint filed with the Commission, and its petition for judicial review of the Commission's decision in the Seventh Circuit Court of Appeals, was that assessment of the demurrage charges in issue by North Western was improper because North Western could not deliver freight cars to Field's plant due to adverse winter weather conditions, and therefore, that North Western's "constructive placement" of cars which Field could not unload (and which began the period in which Field had to unload and release the cars in order to avoid the assessment of demurrage) was improper and ineffective. Field believes that even if the demurrage charges are otherwise applicable, the Commission's order requiring Field to pay them was unreasonable because Field's inability to unload or release the cars within the free time allowed under the applicable tariffs was due to adverse winter weather conditions beyond its control.

Actual delivery of freight cars to a consignee's plant is normally accomplished by means of procedures agreed to between the carrier and the consignee. In some cases, the consignee gives the carrier blanket instructions to place the cars at his plant as soon as they arrive; in others (as here), the carrier advises the consignee by telephone that the cars have arrived at the destination terminal and the consignee issues instructions as to when (and which) cars are to be physically placed at his unloading facilities. The "free time" allowed for unloading and release of cars, after which demurrage begins to accrue, begins when the cars are actually placed at the

consignee's facilities unless the cars are "constructively placed."²

The principal issue involved in this case is a factual one: whether North Western was justified in constructively placing Field's cars. If North Western's constructive placement of these cars was proper, Field clearly was not entitled to relief from the payment of demurrage charges since Field and North Western were parties to an "average" demurrage agreement and under the average agreement (as interpreted in a long line of Commission decisions) adverse weather conditions do not excuse the payment of demurrage regardless of a shipper or receiver's diligence in attempting to load or unload cars. If, on the other hand, constructive placement of Field cars was improper, then the free time allowed for unloading did not begin to run until the cars were actually physically placed in Field's plant for unloading, which would render the demurrage charges at issue inapplicable.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals involved review of a routine Commission order holding the assessment of demurrage charges to be ~~un~~reasonable. The courts lack authority to substitute their judgment for that of the Commission with respect to fact determinations supported, as here, by substantial evidence, and the Court of Appeals clearly did not err as a

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2. The Commission has defined "constructive placement" as follows:

Constructive placement occurs only with respect to cars consigned to, or ordered for delivery on, an industrial interchange track or other than public delivery track, and then only when such delivery cannot be made because of any conditions attributable to the consignee to receive them.

Union Gas and Electric Co. v. Chesapeake & O. Ry. Co., 176 I.C.C. 194, 197-198 (1931). Similarly, the National Demurrage Tariff (referred to in Field's petition for writ of certiorari) authorizes constructive placement of cars when they "cannot be actually placed because of a condition attributable to the consignor or consignee."

matter of law in affirming the Commission's application of its own precedents to the facts of this case.

I. The Standard of Review of the Commission's Decision Is Narrow.

As a preliminary matter, it must be noted that the standard of review of the Commission's decision in this case is very narrow: whether the decision is arbitrary, capricious, and supported by substantial evidence. A reviewing court may not substitute its judgment for that of the Commission with respect to the issue whether North Western's constructive placement of Field's cars was proper; rather, the Court's function is limited to determining "whether the decision was based upon a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). It is not the Court's function to reweigh the evidence, but merely to determine whether substantial evidence supports the agency's findings and whether there exists "a rational connection between the facts found and the choice made." *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974), quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 158 (1962).

In reviewing the Commission's findings on the constructive placement issue, the Court should also bear in mind that in a complaint proceeding before the Commission, the complainant (here, Field) bears the burden of proof. *Atchison, T. & S.F. Co. v. Wichita Board of Trade*, 412 U.S. 800, 812-814 (1973); see also, *Inspection In Transit, Grain and Grain Products*, 359 I.C.C. 624, 636-637 (1979).

II. The Commission's Finding That North Western Was Justified in Constructively Placing Field Cars Is Supported by the Evidence and Accords Fully with the Commission's Own Precedents.

Field claims that under the applicable demurrage tariff, North Western could not constructively place cars if it was

unable to effect physical delivery of the cars due to conditions on its own trackage, regardless of whether the consignee is able to take the cars. However, the Commission has never held that a railroad may not constructively place cars in circumstances such as those involved in this case.

It is important to note that Field does not challenge the Commission's findings of fact on the constructive placement issue. These findings were as follows (App. 13a-15a):

It appears from the somewhat sketchy evidence and pleadings (complainant has the burden of proof) that the carrier and the shipper had an arrangement which governed the delivery of cars to the shipper's plant. This arrangement implemented the average agreement and, in effect, defined constructive placement. First, as cars arrived, the carrier had a duty to inform (by telephone) the shipper of the cars' availability and then to place the cars under "constructive placement". Second, as the shipper needed cars, its responsibility was to request (by telephone) that specific cars be delivered. Third, upon such request, the carrier was obligated to deliver the specific cars requested. If the carrier delivered late, the shipper's demurrage account was credited. If the shipper delayed requesting cars already constructively placed, its demurrage account was debited. The agreement clearly provided that the usual defense of bad weather would not preclude assessment of demurrage.

This average agreement, as used here and in other situations, mutually benefits shippers and carriers. Its benefit to the shipper here was to allow it to determine exactly what cars would be delivered and when. The carrier had standing instructions to hold all cars until requested to release specific ones. There was no evidence that any contrary instructions had been given by the shipper in light of the adverse winter weather conditions.

Therefore, the pivotal issue is whether cars had been requested. If cars were requested, then the carrier's obligation was to deliver them. If cars were not requested, then the carrier's obligation was never triggered and we need not reach the question of the carrier's actual ability to place the cars.

Field does not allege that it requested cars on a regular basis during this period but has argued instead that its failure to do so was excused by the abnormal weather conditions. The Review Board's statement that cars had been requested and not delivered apparently refers only to a few days in which the carrier could not deliver (and accordingly credited complainant's account) and certain Saturday and Sunday requests during which, by the terms of the agreement, the carrier was not obligated to perform delivery. To the extent this question is further in issue, complainant has failed to present sufficient detailed evidence showing it requested cars but they were not delivered.

These findings are fully supported by the administrative record,³ and as previously stated are not here challenged by Field.

Having determined that North Western's constructive placement of Field cars during the period in issue was proper, the Commission went on to conclude that because Field had entered into an average demurrage agreement with North Western, weather interference did not excuse Field from the payment of demurrage if it failed to unload the cars within the applicable free time following constructive placement. This conclusion is fully supported by numerous prior court and Commission decisions, as the Court of Appeals acknowledged below (App. 10a-11a). See, e.g., *Cleveland Electric Illuminating Co. v. I.C.C.*, 685 F. 2d 170 (6th Cir. 1982); *Monongahela Power Co. v. I.C.C.*, 640 F. 2d 504 (4th Cir. 1981), cert. denied, 454 U.S. 838 (1981); *Marshall-Putnam*

3. Although Field's witness claimed that North Western was unable to move Field cars out of North Western's yard, this claim was supported by nothing more than evidence that winter weather conditions were severe in the Chicago area beginning in December, 1978 and continuing through January and February, 1979, and that North Western performed no switching at Field's plant on ten individual days during the three-month period involved. The evidence also showed that North Western reduced its original demurrage bills in acknowledgment that Field should not be charged for these ten days when North Western did not provide switching service to Field's plant. North Western's evidence further showed that a large number of cars were under constructive placement awaiting orders for placement at the beginning of January, 1979; that this backlog was essentially reduced to zero by the middle of February (thus indicating North Western's ability to provide service to Field's plant), but that the backlog thereafter was again allowed to grow until late March. (The exhibit containing this evidence as received in evidence by the Commission is reproduced for convenience as an appendix to this brief.) In addition, the evidence showed that under Field's practice of ordering cars placed by specific initial and number, when the cars arrived North Western did not know which cars would be ordered placed or the day of requested placement, which (by arrangement between the parties) resulted in issuance of notices of constructive placement. Finally, there was no evidence of record that North Western failed to deliver cars upon request by Field because of weather conditions affecting North Western's own operations except on the ten specific dates referred to above, for which no demurrage was charged.

Oil Co. v. Chicago, R.I. & P. R. Co., 316 I.C.C. 581, 583 (1962); *Oglebay Norton Co. v. Chesapeake & O. Ry. Co.*, 314 I.C.C. 511, 514 (1961); *Allied Concrete Supply Co. v. Chicago & N. W. Ry. Co.*, 296 I.C.C. 451, 452 (1955). Even Field, at page 19 of its opening brief to the Court of Appeals, has acknowledged that "[i]n the more recent cases cited by the Commission the rule has been to uniformly deny waiver of the penalty demurrage when the average agreement is in force."

There is, thus, no inconsistency between the Commission's decision and the tariff incorporating the average agreement and defining constructive placement, as interpreted by the Commission and the courts in prior decisions.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this case are insubstantial, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 24, 1983

CHICAGO AND NORTHEASTERN TRANSPORTATION COMPANY

EXHIBIT 2

STATEMENT OF CARLOADS RECEIVED BY FIELD CONTAINER CORP.
ELK GROVE VILLAGE, ILLINOIS
JANUARY, FEBRUARY, MARCH, 1979

	JANUARY, 1979																															
DATE	1/1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	
# OF CARS ON HAND UNDER C.F.	12	12	12	12	10	10	10	10	12	14	13	13	13	13	13	13	13	13	13	13	13	13	11	10	10	10	10	10	10	10	11	
# OF CARS ORDERED PLACED	-	-	1	1	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	1	2	-	-	-	-	-	-	-	1	1
# OF CARS ACTUALLY PLACED	-	-	-	2	-	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-	-	2	1	-	-	-	-	-	-	-	1	1

FEBRUARY, 1979																																
DATE			S	S							S	S						S	S	M				S	S							
# OF CARS ON HAND UNDER C.F.	2/1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28				
# OF CARS ORDERED PLACED	12	15	13	13	13	10	7	4	1	1	1	1	2	2	0	5	6	6	4	4	5	8	8	8	8	8	8	8	10			
# OF CARS ACTUALLY PLACED	M/R	M/R	-	-	3	3	3	3	-	-	-	-	-	2	2	-	-	-	-	2	2	-	2	2	-	-	2	2				
	-	2	-	-	3	3	3	3	-	-	-	-	-	2	2	-	-	-	2	2	-	2	2	-	-	2	-	-				

DATE	MARCH, 1979																														
			S	S						S	S						S	S					S	S							S
	3/1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
# OF CARS ON HAND UNDER C.F.	8	7	7	7	7	8	6	6	6	5	5	5	9	8	9	9	8	8	8	7	11	9	8	8	8	8	9	10	7	4	1
# OF CARS ORDERED PLACED	2	1	-	-	1	2	2	1	2	-	-	1	2	2	3	3	-	-	2	3	3	3	2	-	-	1	-	3	3	3	-
# OF CARS ACTUALLY PLACED	2	1	-	-	1	2	2	1	2	-	-	1	2	2	3	3	-	-	2	3	3	3	-	-	-	3	3	3	3	3	-

N/A - NO RECORD